

Temporary Nonagricultural Workers (H-2B Visas)

Sections 101(a)(15)(H)(ii)(b) and 214(c)(1), (c)(14), (g)(1) and (g)(9) of the Immigration and Nationality Act, as amended and 20 CFR Part 655 Subpart A and 8 CFR Part 214.2(h)(6)

Who is Covered

The regulations of the U.S. Citizenship and Immigration Service (USCIS), 8 CFR Part 214.2(h)(6), apply to employers who wish to import temporary nonagricultural workers classified under Section 101(a)(15)(H)(ii)(b) to work in temporary jobs in the United States. Section 214(c)(1) of the Immigration and Nationality Act (INA) requires the Department of Homeland Security (DHS) to consult with the Department of Labor before determining whether any worker can be admitted under Section 101(a)(15)(H)(ii)(b). Section 214(g)(1) of the INA provides that the number of aliens during any fiscal year who can be issued visas or provided nonimmigrant status under Section 101(a)(15)(H)(ii)(b) cannot exceed 66,000. "Returning workers" who counted toward the H-2B cap in prior years are excluded from the cap from October 1, 2004 through September 30, 2006.

Basic Provisions/Requirements

USCIS regulations require that employers who file H-2B petitions with the USCIS (except for temporary employment on Guam) must include a certification from the Department of Labor stating that qualified workers are not available in the U.S. and that the foreign worker's employment will not adversely affect wages and working conditions of similarly employed U.S. workers. If the Department of Labor notified the employer that certification cannot be made, the employer may submit countervailing evidence to USCIS.

To obtain certification, employers must file applications for certification of temporary nonagricultural jobs on Part A of an Application for Alien Employment Certification, Form ETA 750 (www.workforcesecurity.dol.gov/foreign/750inst.asp), with the State Workforce Agency (SWA) (<http://workforcesecurity.dol.gov/foreign/contacts.asp>) serving the geographic area where the alien will work. To receive a timely determination, the employer should apply at least 60 but no more than 120 days before the workers are needed.

The employment for which certification is requested must be for less than one year, and the need for the service or labor shall be a one-time occurrence, seasonal need, peak load need, or intermittent need. General Administrative Letter No. I-95

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(http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=393), dated November 10, 1994, (amended by General Administrative Letter No. I-97 Change 1, dated December 22, 1997) states the requirements for obtaining temporary nonagricultural labor certifications.

Other detailed information may also be found on the H-2B Certification for Temporary Nonagricultural Work page (<http://workforcesecurity.doleta.gov/foreign/h-2b.asp>) of the Employment and Training Administration's Web site (www.doleta.gov).

After receiving an application, the SWA prepares a job order and places it into the Employment Service System for 10 days. The employer, after filing the application with the SWA, advertises the job opportunity in a newspaper of general circulation for three consecutive days, or in a professional, trade, or ethnic publication, whichever is most appropriate for the occupation and most likely to bring responses from U.S. workers.

The employer must also document that unions and other recruitment sources, appropriate for the occupation and customary to the industry, could not refer qualified U.S. workers. After the employer completes the required recruitment, it must submit a recruitment report that explains the lawful job-related reasons for not hiring each U.S. worker that applied.

Employee Rights

The employer seeking to employ H-2B workers must attest that the workers will be paid at least the prevailing wages for the occupation in the area of intended employment. In addition, worker-protection provisions that apply to U.S. workers (e.g., the Fair Labor Standards Act) cover nonimmigrant H-2B workers. Workers may file complaints under these general worker protection laws with the local Wage and Hour Division offices (www.dol.gov/esa/contacts/whd/america2.htm).

Compliance Assistance Available

Employers may obtain information on how to apply for a temporary nonagricultural labor certification, including application forms and directives that contain prescribed procedural requirements, from the SWAs (<http://workforcesecurity.doleta.gov/foreign/contacts.asp>) or the national office of the Employment and Training Administration (www.doleta.gov). SWA staffs can help employers fill out application forms, place job orders, and draft advertisements that meet prescribed requirements.

Penalties/Sanctions

The Save Our Small and Seasonal Businesses Act of 2005 (Act) authorized, effective October 1, 2005, the imposition of such administrative remedies (including civil monetary penalties in an amount not to exceed \$10,000 per violation) as DHS determines to be appropriate if an employer is found to have committed a substantial failure to meet any of the conditions of the petition or a willful misrepresentation of a material fact in such petition. The Act permits DHS to delegate to the Secretary of Labor the authority to impose sanctions. The Act also authorizes DHS to deny petitions filed with respect to these employers for a period of one to five years.

Relation to State, Local, and Other Federal Laws

Various other laws, such as workers' compensation, tax (unemployment insurance, local, state, and federal) and the Family and Medical Leave Act, may apply to the employment of these workers.